

*a***LIGAR FERNANDEZ****v.****ERIC CLAUDE COOKE***b*

HIGH COURT MALAYA, IPOH
ABDUL HAMID EMBONG J
[ORIGINATING SUMMONS NO: 24-180-2000]
5 DECEMBER 2001

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SUCCESSION: *Probate - Revocation of grant - Probate and Administration Act 1959, s. 34 - Whether there was sufficient cause to allow court's interference - Proper test to be applied*

SUCCESSION: *Executors - Revocation of appointment - Application for - Whether application to be granted*

d

TRUSTS: *Trustees - Removal - Application for - Trustees Act 1949, s. 40 - Whether application to be granted*

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This was an application by the plaintiff to revoke the grant of probate to the defendant and, to remove the latter's appointment as executor and trustee of the estate of the deceased, one Leila Labrooy. The plaintiff claimed that the defendant's involvement in the acts of transferring assets and shares of a company (in which the latter was a director) to himself and his beneficiaries were tainted or improper. The plaintiff also submitted that the defendant was not capable of administering the estate as he resided in the United Kingdom and had been out of Malaysia for more than 12 months.

*f***Held:***g*

[1] Section 34 of the Probate and Administration Act 1959 ('the PAA' hereafter) provides that a probate may be revoked for any sufficient cause. The welfare and the interests of the beneficiaries of an estate would be the paramount criterion in deciding whether or not there was a sufficient cause for the courts to interfere. This is strictly an objective test and the plaintiff ought to adduce sufficient evidence to raise a strong suspicion of the defendant's inaction, want of diligence and honesty, or a conflict of interest situation or inability to act. (p 155 h)

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[2] Under s. 40 of the Trustees Act 1949 ('the TA' hereafter), the court may exercise its inherent jurisdiction to remove a trustee on the grounds provided under the said section. And, the court could appoint new or additional trustees and in consequence of the removal of an existing trustee. However, due regard ought to be given to the testator's selection

of executor in exercising the discretionary power. Sub-section (1) further requires the trustee to be domiciled in the country, in that an absence for more than 12 months would render the said party statutorily incapable of holding the office of a trustee. (pp 157 b-d, 158 b & 159 e-f)

[3] There was sufficient evidence to prove that the transactions perpetrated by the defendant were suspicious and not for the benefit of the estate. Based on the objective test, the probate was revoked pursuant to s. 34 of the PAA. (p 161 b-f)

[4] Pursuant to s. 40(1) of the TA, the defendant was also removed from his office as executor and trustee. He had been an absent trustee to effectively execute his duties as a trustee. It was also proven that the estate could not be fully administered in that payments to three charities named under the will were never made. (p 160 e-g)

[Plaintiff's application allowed with costs.]

Case(s) referred to:

Damayanti Kantilal Doshi & Ors v. Jigarlal Katilal Dosni & Ors [1998] 4 CLJ 81 (*refd*)

Yusof Ahmad & Ors v. Hongkong Bank (Singapore) Ltd & Ors [1990] 2 MLJ 326 (*refd*)

Letterstedt v. Broers & Anor [1884] 9 AC 371 (*fol*)

Miller v. Cameron [1936] 54 CLR 572 (*refd*)

Monty Financial Services Ltd (Formerly Known As Inscorp Holdings Ltd) & Anor v. Delmo [1995] Vic Lexis 1477 (*fol*)

Re Khoo Boo Gong (decd) Khoo Theng Seong v. Teoh Chooi Ghim & Ors [1981] 2 MLJ 68 (*refd*)

Legislation referred to:

Probate and Administration Act 1959, ss. 16(b), 34

Trustees Act 1949, s. 40(1)

Administration and Probate Act 1958 [Aust], s. 34(1)(c)

For the plaintiff - T Marbeck; M/s TS Marbeck

For the defendant - James Devadason; M/s Maxwell, Kenion, Cowdy & Jones

Reported by M Maheswaran

JUDGMENT

Abdul Hamid Embong J:

By this application, the plaintiff (LF) seeks to revoke the grant of probate to the defendant (EC) and to remove forthwith EC's appointment as the executor and trustee of the estate of Leila Dulcie Allana LaBrooy (LaBrooy). The

- a* determination of this application will, in my view, substantially resolve three other related applications in encl. 8 of OS. 24-1146-1999 and encls. 1 & 6 in OS. 24-891-2000.

- b* Although learned counsel for the defendant had contended that the matters under consideration are too contentious to be determined by affidavits, that there are triable issues and that, thus, the court should hear *viva voce* evidence, this court found that there was no such necessity and that this application should proceed as it originated and affidavit evidence could sufficiently determine this matter. On that basis, this application was proceeded with, and submissions heard. Notice to cross-examine witnesses was declined by the court.
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Background Facts

- On 11 February 1999 LaBrooy passed away and left a will dated 24 April 1996 and executed two codicils dated 17 April 1997 and 15 August 1997.
- d* Probate was obtained by her appointed co-executors and trustees namely the plaintiff (LF) and the defendant (EC) and the grant of probate was issued on 22 September 1999 by the High Court at Ipoh. LF is the former husband of one Patricia Frances O'Hara (Patricia), an adopted daughter of LaBrooy and the main beneficiary under her will, whilst EC is the nephew of LaBrooy.
- e* On 23 April 1959, a family company called CH La Brooy Sdn Bhd (CHLSB) was incorporated with LaBrooy appointed as its permanent managing director. On 8 April 1996 a transfer of certain godowns (the Godown Properties) was effected to CHLSB for a consideration of RM1.6 million purportedly raised from the issue of 240,000 new shares in CHLSB valued at RM6.67 per share (equalling RM1,680,000).

- f* There were two matters that disquieted both LF and the beneficiary, Patricia, giving rise to suspicions of misconduct on EC's part. These were related to the disposal of the estate's assets namely, the transfer of the Godown Properties to CHLSB and secondly, the transfer of LaBrooy's shares in CHLSB to EC and his relatives. These now became the basis of the complaints by Patricia who then requested LF to initiate this proceeding.
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- It was submitted for the plaintiff that these transactions were tainted or improper and that these assets should be included as assets of the estate for distribution to the beneficiaries. It was also submitted that EC, at the relevant time was a substantial shareholder and a director in charge of CHLSB and that had placed him in a position of serious conflict of interest in relation to his duties and obligations as an executor and trustee under the will, and as such, his removal is warranted in law and in fact. For the defence it was submitted, that suspicion alone also does not amount to a fraud and that fraud should have been specifically pleaded. It was also contended that there was
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no evidence that EC had exerted undue influence over LaBrooy and that her old age did not imply her lack of acumen. In reply to LF's allegation that EC was out of the country for more than 12 months, it was submitted by EC's counsel that EC had a permanent address in Ipoh as evidenced by his identity card and that he owns substantial furniture in a house belonging to his aunt who had allowed her house to be used as EC's permanent address in Malaysia. It was further contended that EC had done all he could as an executor of LaBrooy's will and that the allegations of impropriety and dereliction of duties thrown at him were false and not proven. Essentially, the defence stand was that there were disputes of acts and triable issues to be determined, and as such an open court trial was called for.

The reliefs sought by the plaintiff here is two-pronged. One is for the revocation of the probate and the other is for the removal of the defendant as executor and trustee under the will. The first relief is provided by statute under s. 34 of the Probate and Administration Act 1959 (Rev 1972) (the PAA) which states:

Section 34 - Any probate or letters of administration may be revoked or amended for any sufficient cause.

In *Damayanti Kantilal Doshi & Ors v. Jigarlal Katilal Dosni & Ors* [1998] 4 CLJ 81, it was held by the Court of Appeal that "the phrase 'sufficient cause' has not been defined but the courts have always considered the welfare and interests of the beneficiaries of an estate as the paramount criterion in deciding whether or not there is sufficient cause to interfere. This is strictly an objective test". The Court of Appeal had applied the same test as relied upon by an earlier Federal Court decision in *Re Khoo Boo Gong (decd) Khoo Theng Seong v. Teoh Chooi Ghim & Ors* [1981] 2 MLJ 68. TS Marbeck, of learned counsel for the plaintiff, had referred to the definition of 'sufficient cause' according to *Black's Law Dictionary* which defined it as:

such cause as to hold defendant to answer charges is reasonable or probable cause or that state of facts as would lead a man of ordinary caution to conscientiously entertain a **strong suspicion** of defendant's guilt. (emphasis added)

Learned counsel had argued, and I accept, that, applying the objective test, all that is needed is for the plaintiff to adduce sufficient evidence to raise a strong suspicion of the defendant's inaction, want of diligence and honesty, or a conflict of interest situation or inability to act to invoke this court's jurisdiction under s. 34 PAA and allow the reliefs sought. The allegations for consideration are thus, a question of facts to be determined by this court on an objective test.

- a* It is immaterial therefore, if the allegations are actually believed or not; so long as it can be objectively determined that they raised a reasonable suspicion, then, the plaintiff would have succeeded. In this case, the arguments advanced for the first relief of revocation of the probate had been considered together with the submission on the need to remove EC as the executor and trustee
- b* under the will, for the simple reason that the grounds are interrelated and invariably overlapping. For the second relief, it was common ground that EC held both offices of executor and trustee under the will. As an executor and trustee EC stood in a combined fiduciary relationship with the beneficiaries and his duties in both offices are closely connected. In cases where an executor is also appointed as a trustee, there is a diversity of function as described in
- c* the *Law of Trusts in Australia*, 5th edn (1986) in the following passage:

- d* The origin of the offices of trustee and executor are quite different, but in modern times, largely as the result of statute, the two offices have a greater similarity than heretofore. An executor, like a trustee, is in a fiduciary relation with the beneficiary and the essential elements of a trust are all present in executorship. However, although there are great similarities between the two offices, it is not possible to identify the position of an executor with that of a trustee. Their respective powers and duties differ in important respects. The principal duties of an executor are to get in the assets of the deceased, to pay his debts, to pay the legacies given by the will, and to distribute the assets. If
- e* a testator appoints the same person his executor and his trustee, which is usual nowadays, then that person acts as executor when he performs executorial duties, and thereafter while he continues to hold the property he is a trustee thereof. However, even though he thus becomes a trustee, his capacity as executor still remains, in so far as he may be called upon at any future time to deal in his capacity as executor with any assets which may subsequently
- f* be discovered in the estate. He may thus be executor in respect of certain assets of the testator and trustee in respect of others. If the executor, while still performing his executorial duties, carries out an instruction in his testator's will to set aside a fund and to hold it on trust for certain beneficiaries, he will, upon him setting aside that fund, become a trustee thereof and in respect of that property his executorial duties will be at an end.
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In the book entitled *Probate and Administration in Singapore and Malaysia: Law and Practice*, the learned author, on the appointment of executors and trustees observed the following

- h* 2. Appointment of executors and trustees
- A will provides for the disposition of a testator's property. He does so through his representatives named in the will as executors and trustees. Though the same persons may be appointed as executors and trustees, their functions are quite distinct. An executor calls in the estate, converts the assets into cash and distributes the same amongst the beneficiaries if this is what the will directs.
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The act of the executor in calling in the estate and attending to all predistribution formalities is the act of an executor *per se*. The act of distributing the estate amongst the different beneficiaries is the act of a trustee. These are distinct duties and it is a slender line which divides the duties of an executor from that of a trustee.

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The court may exercise its inherent jurisdiction to remove a trustee on the grounds as provided under s. 40 of the Trustees Act 1949 (Act 208) which states:

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40. Power of appointing new or additional trustees.

(1) Where a trustee, either original or substituted, and whether appointed by a Court or otherwise, is dead, or remains out of Malaysia for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, or is a minor then, subject to the restrictions imposed by this Act on the number of trustees.

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The court may also appoint new or additional trustees under that section and in consequence of the removal of an existing trustee.

In *Yusof Ahmad & Ors v. Hongkong Bank (Singapore) Ltd & Ors* [1990] 2 MLJ 326, the grounds justifying the removal of trustees were held to be:

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The acts or omissions which are sufficient for the removal of trustees must be such as to endanger the trust property, to show want of honesty or a want of proper capacity to execute the duties, or a want of reasonable fidelity.

In similar vein, over a century ago in *Letterstedt v. Broers & Anor* [1884] 9 AC 371, a case concerning removal of trustees, the proposition put was that “an executor has an obligation to preserve the trust fund and to safeguard the interest of the beneficiaries”. And in Australia, in *Miller v. Cameron* [1936] 54 CLR 572, that statement of principle has been adopted when Dixon J restated it in the following manner:

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The jurisdiction to remove a trustee is exercised with a view to the interests of the beneficiaries, to the security of the trust property and to an efficient and satisfactory execution of the trusts and a faithful and sound exercise of the powers conferred upon the trustee. In deciding to remove a trustee the Court forms a judgment based upon considerations, possibly large in number and varied in character, which combine to show that the welfare of the beneficiaries is opposed to his continued occupation of the office. Such a judgment must be largely discretionary.

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The learned judge in that case also stated the following principle, to which this court subscribes:

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- a* It is fundamental that a trustee must carry out the terms of the trust. If he fails to do so, he may be removed as trustees by a Court even if no harm has been done to the beneficiaries or to the trust.

- The statutory basis provided by s. 40 of the Trustees Act should in this court's view, remain flexible and wide in its interpretation to allow the court the full force of its powers in its discretionary exercise to remove a trustee where it can be shown that either a trustee has failed or refused to carry out the terms of the trust or where by his acts or omission the trustee has endangered the trust property. One important point to remember in exercising this discretionary power however, is that testator's selection of executor should not lightly be ignored or disregarded.
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- In an unreported decision of Ashley J of the Supreme Court of Victoria in *Monty Financial Services Ltd (Formerly Known As Inscorp Holdings Ltd) & Anor v. Delmo* (see 1995 Vic Lexis 1477), the learned judge after considering a number of authorities said:
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- The consequences of these lines of authority was said to be that s. 34(1)(c) applies not only to misconduct, such as unwarranted failure to administer an estate or so as to cause loss to beneficiaries, but also to cases of conflict of duty and interest. In that context, it is enough that there exists a suspicion that a dereliction of duty will arise, or that there is temptation for the executor to prefer his personal interest to his duty as executor.
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- That comment was made in the context of the Australian s. 34(1)(c) of the Administration and Probate Act 1958 which allows for the removal of an executor or administrator to whom probate has been granted where it is found that he "is unfit to act or refuses to act or is incapable of acting in such office." I had referred to the abovesited passage from *Delmo* as equally applicable to the interpretation on the factors of 'unfitness, refusal or incapacity to act' as found in s. 40 of our Trustees Act 1949 for which there is a lack of domestic authorities.
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- From the authorities referred to above, it may be concluded that this court is empowered to remove an executor or a trustee, where there has occurred a failure to act grounded either on unfitness or incapacity and the primary consideration, on an objective examination of facts, is to determine that the welfare and interest of the beneficiaries and the assets of the estate be safeguarded. The grounds for removal should remain open, or, to borrow the words of Dixon J, "based upon considerations possibly large in number or varied in character" according to the particular circumstances of each case. It is perhaps apt to now quote the very words of Lord Blackburn who propounded this principle in *Letterstedt* and to which this court adhere in deciding this application. His Lordship said this:
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In exercising so delicate a jurisdiction as that of removing trustees, their Lords do not venture to lay down any general rule beyond the very broad principle above enunciated, that their main guide must be the welfare of the beneficiaries. Probably it is not possible to lay down any more definite rule in a matter so essentially dependent on details often of great nicety ...

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It is quite true that friction or hostility between trustees and the immediate possessor of the trust estate is not of itself a reason for the removal of the trustees. But where the hostility is grounded on the mode in which the trust has been administered, where it has been caused wholly or partially by substantial overcharges against the trust estate, it is certainly not to be disregarded.

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Looking, therefore, at the whole circumstances of this very peculiar case, the complete change of position, the unfortunate hostility that has arisen, and the difficult and delicate duties that may yet have to be performed, their Lordships can come to no other conclusion than that it is necessary, for the welfare of the beneficiaries, that the Board should no longer be trustees.

*c**d*

Court's Finding On The Facts

Marbeck for the plaintiff, in his submission, had adverted to a host of factors against the conduct of EC, citing instances of unfitness to act, conflict of interest, inaction, want of reasonable fidelity and dishonesty, and as regards the transfer of the Godown Properties he had alleged discrepancy, impropriety and illegality in the transactions.

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The first of which is the allegation that EC resided in England and had been out of Malaysia in excess of 12 months, a factor which if proven, would make him statutorily incapable of acting in the office of trustee pursuant to s. 40(1) of the Trustees Act 1949. It is easy to see the rationale of this requirement on domicile. An absent trustee would not be in the position to administer the trust property located here. An absence from Malaysia of longer than 12 months becomes a legal incapacity for a trustee and in fact under s. 40(1) of the Trustee Act 1949 is the second most damning factor after death, to incapacitate a trustee from holding his office. Similarly, a legally incapacitated executor by reason of absence may be replaced by another who is capable of administering the estate (see s. 16(b) PAA 1959). Various evidence were put forth to show that EC had been away overseas all these years, one of which was his address noted in the register of members of CHLSB dated July 1971, which described EC's then address as "73 Dunstan Road, Golders Green, London NW 11". From another document ie, the Southampton City Council, Register of Electors 1999 (Qualifying date 10 October 1998), it was successfully shown that EC was a registered voter for the constituency of Southampton Test in England, thus raising an inference that he was a resident

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- a* within that constituency. This Register of Electors 1999 (exh. 'LF9' encl. 2) also supports LF's allegation that EC resides at 31, Chamberlain Road, Highfield, Southampton, England, as shown from EC's own letter to LF (exh. LF 6A). The plaintiff also produced shares certificates of EC showing his share holdings in CHLSB and describing his address in 1996 as 16 Icen Road,
- b* Weymouth, Dorset, England (see exh. 'LF 2A, 2B & 2C'). In his affidavit, LF also stated that EC is an employee with the University of Southampton and had in fact been a permanent British resident for over twenty years. EC has an e-mail address at ecc@ecs.soton.ac.UK and was too busy with his University work to execute the will. This can be seen from EC's letter to Patricia (exh. 6B) wherein he admitted to his pressure of work and busy schedule with the university.
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- In response to this issue of his absence from Malaysia and residence in England, EC had deposed that he has a permanent address in Malaysia at No. 2 Jalan La Brooy, Ipoh. This house is that of his late auntie's (Ivy Cooke)
- d* and he said that when she was still alive he would always stay with her on his visits to Ipoh. EC also said that he is a Malaysian citizen. Further, the deceased, LaBrooy had also allowed him to use her address, at No. 12 Jalan La Brooy as his permanent address. This may be so, but the court it must be said, is not concerned with EC's citizenship or his having a permanent postal
- e* address in Malaysia but rather with an executor's continued absence from Malaysia for over 12 months, for which the law forbids. It is a question of one's efficaciousness and ability as a trustee under a will. Against the overwhelming evidence to the contrary as shown by the plaintiff to which EC had not seriously disputed, it is this court's finding that EC had been an absent
- f* trustee to effectively execute his duties as a trustee. It had also been shown, because of EC's continued absenteeism, that the estate could also not be fully administered in that payments to three charities named under the will were never made. Marbeck in his submission, had charged him with total inaction. In the circumstances, I can only agree with learned counsel. On this ground alone, pursuant to s. 40(1) of the Trustees Act, EC must be removed from
- g* his office as he is now found to be unfit and incapable of acting as a trustee.

- As for the other issues that disturbed both LF and his ex-wife, Patricia viz the transfer of the Godown Properties and the shares in CHLSB by EC to himself, it had been submitted that EC had placed himself in a position of
- h* conflict of interest in his role as trustee and director in control of CHLSB and benefited from both transactions. The Godown Properties were originally owned by the testator, LaBrooy and her siblings. The facts adduced showed that EC was the alter ego of CHLSB. He was both *de facto* director in charge and a substantive shareholder in that company and as a trustee he should have
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called in the properties and in so doing, enlarged the estate for the benefit of all the beneficiaries. But he had chosen to instead transact in the shares in a manner that benefitted himself and a few selected beneficiaries. The existing directors at the time of transfer was Ivy Cooke, then almost 80 years of age and EC. At such a late age, it can safely be presumed that she had to rely on the latter to manage the company. Learned counsel for the plaintiff had also succeeded in showing that CHLSB was a company with an issued capital of a mere RM657,400 and was not in the position to pay for the Godown Properties valued at RM1.68 million. Further, the authorised capital of CHLSB was only RM1 million. It was also shown that one of the transferees, Lionel La Brooy, was paid RM400,000 in the transaction which works out to be 25% of the transfer price when he had a shareholding of only 20%. Besides that, it was shown that it was not even CHLSB which paid the money, but that it was paid out of one Dulcieville Estate account of which the said Lionel was a joint owner. Marbeck questioned the propriety of this dealing since, in effect, Lionel was paid for the transfer with money partly belonging to him. Counsel submitted and this court agreed, that the transaction was tainted with fraud, to which CHLSB was a party.

There are various other instances cited by Marbeck in his submission to show that the transactions perpetrated by EC were dealt under suspicious circumstances and not for the benefit of the estate. I do not wish to recount them all except to say that this court having considered these circumstances had come to a conclusion that, on an objective test, and guided by the principles enunciated in the abovesited authorities, there had been raised sufficient cause to forthwith revoke the probate pursuant to s. 34 PAA and also remove EC from his office of executor and trustee.

For these reasons, this application was allowed with costs.

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